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7 OWEN DIAZ,
8 Plaintiff,
9 v.
10 TESLA, INC., et al.,
11 Defendants.

Case No. [3:17-cv-06748-WHO](#)

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**ORDER ON MOTION FOR
JUDGMENT AS A MATTER OF LAW,
MOTION TO STRIKE**

18 Re: Dkt. Nos. 281, 282

19 After both parties rested in their recent jury trial, defendant Tesla, Inc. (“Tesla”), moved
20 for judgment as a matter of law and to strike the testimony of one of plaintiff Owen Diaz’s
21 experts. I denied those motions orally from the bench. This Order provides a written explanation
22 for those denials and assumes familiarity with the trial record.

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LEGAL STANDARDS

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I. JUDGMENT AS A MATTER OF LAW

19 Federal Rule of Civil Procedure 50 governs judgments as a matter of law (“JMOL”) in jury
20 trials. Under Rule 50(a)(1), “[i]f a party has been fully heard on an issue during a jury trial and the
21 court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for
22 the party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a
23 motion for judgment as a matter of law against the party on a claim or defense that, under the
24 controlling law, can be maintained or defeated only with a favorable finding on that issue.” A
25 JMOL motion may be granted “only if, under the governing law, there can be but one reasonable
26 conclusion as to the verdict.” *Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276,
27 1283 (9th Cir. 2001). As a result,

28 In ruling on a motion for JMOL, the court is not to make credibility determinations or

1 weigh the evidence and should view all inferences in the light most favorable to the
2 nonmoving party. The court must accept the jury's credibility findings consistent with the
3 verdict. It must disregard all evidence favorable to the moving party that the jury is not
4 required to believe. The court may not substitute its view of the evidence for that of the
5 jury.

6 *Id.* (internal quotation marks, citations, and alteration omitted).

7 II. MOTION TO STRIKE

8 Federal Rule of Evidence 702 allows a qualified expert to testify "in the form of an opinion
9 or otherwise" where: (a) the expert's scientific, technical, or other specialized knowledge will help
10 the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is
11 based on sufficient facts or data; (c) the testimony is the product of reliable principles and
12 methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.
13 Fed. R. Evid. 702. Expert testimony is admissible under Rule 702 if it is both relevant and
14 reliable. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993). "[R]elevance
15 means that the evidence will assist the trier of fact to understand or determine a fact in issue."
16 *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007); *see also Primiano v. Cook*, 598 F.3d 558,
17 564 (9th Cir. 2010) ("The requirement that the opinion testimony assist the trier of fact goes
18 primarily to relevance.") (internal quotation marks omitted).

19 Under the reliability requirement, the expert testimony must "ha[ve] a reliable basis in the
20 knowledge and experience of the relevant discipline." *Primiano*, 598 F.3d at 565. To ensure
21 reliability, the court must "assess the [expert's] reasoning or methodology, using as appropriate
22 such criteria as testability, publication in peer reviewed literature, and general acceptance." *Id.*
23 These factors are "helpful, not definitive," and a court has discretion to decide how to test
24 reliability "based on the particular circumstances of the particular case." *Id.* (internal quotation
25 marks and footnotes omitted). "When evaluating specialized or technical expert opinion
26 testimony, the relevant reliability concerns may focus upon personal knowledge or experience."
27 *United States v. Sandoval-Mendoza*, 472 F.3d 645, 655 (9th Cir. 2006).

28 The inquiry into the admissibility of expert testimony is "a flexible one" in which "[s]haky
but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to
the burden of proof, not exclusion." *Primiano*, 598 F.3d at 564. The burden is on the proponent

1 of the expert testimony to show, by a preponderance of the evidence, that the admissibility
2 requirements are satisfied. *Lust By & Through Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594,
3 598 (9th Cir. 1996); *see also* Fed. R. Evid. 702 advisory committee's note.

4 DISCUSSION

5 I. MOTION FOR JUDGMENT AS A MATTER OF LAW

6 Tesla's motion for JMOL is narrow: it argues that "Plaintiff did not meet his burden to
7 establish Plaintiff was in a contractual relationship with Tesla, nor has there been any evidence of
8 a contract under which Plaintiff has rights under Section 1981." Motion for Judgment as a Matter
9 of Law ("JMOL Mot.") [Dkt. No. 282] 1. As noted, I denied the motion.

10 42 U.S.C. § 1981(a) provides, "[a]ll persons within the jurisdiction of the United States
11 shall have the same right in every State and Territory to make and enforce contracts, to sue, be
12 parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security
13 of persons and property as is enjoyed by white citizens, and shall be subject to like punishment,
14 pains, penalties, taxes, licenses, and exactions of every kind, and to no other." And the phrase
15 "'make and enforce contracts' includes the making, performance, modification, and termination of
16 contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual
17 relationship." 42 U.S.C. § 1981(b). It is "well established" that the statute "prohibits racial
18 discrimination in the making and enforcement of private contracts." *Runyon v. McCrary*, 427 U.S.
19 160, 168 (1976). Unlike statutes that focus on employment discrimination, "Section 1981 offers
20 relief when racial discrimination blocks the creation of a contractual relationship, as well as when
21 racial discrimination impairs an existing contractual relationship, so long as the plaintiff has or
22 would have rights under the existing or proposed contractual relationship." *Domino's Pizza, Inc.*
23 v. *McDonald*, 546 U.S. 470, 476 (2006).

24 As I explained from the bench, there are two ways by which a reasonable jury presented
25 with the evidence at trial could have found that there was a contractual relationship sufficient to
26 create Section 1981 liability.

27 A. Contract of Employment

28 First, the jury could (and ultimately did) reasonably conclude that Tesla was an employer

1 of Diaz and that an employment contract therefore governed their relationship.

2 In California, as a general matter, “[a] contract of employment is governed by the same
3 rules applicable to other types of contracts.” *Reynolds Elec. & Eng’g Co. v. Workmen’s Comp.*
4 *Appeals Bd.*, 65 Cal. 2d 429, 433 (1966). The four elements to create a contract under California
5 law are: (1) parties capable of contracting, (2) their consent, (3) a lawful object, and (4)
6 consideration. Cal. Civ. Code § 1550. The “consent” required is the “mutual consent of the
7 parties,” which is “generally achieved through the process of offer and acceptance.” *DeLeon v.*
8 *Verizon Wireless, LLC*, 207 Cal. App. 4th 800, 813 (2012) (internal citations omitted). Whether
9 this consent occurred is determined under an objective standard based on the parties’ “outward
10 manifestations or expressions” and “the reasonable meaning of their words and acts, and not their
11 unexpressed intentions or understandings.” *Id.* “Consideration is present when the promisee
12 confers a benefit or suffers a prejudice.” *Prop. California SCJLW One Corp. v. Leamy*, 25 Cal.
13 App. 5th 1155, 1165 (2018). The consideration “must actually be bargained for as the exchange
14 for the promise” or “have induced the promisor’s promise.” *Id.* (internal quotation marks and
15 citations omitted).

16 Under the law (as both parties agree) a person can have more than one employer for
17 present purposes. *U.S. Equal Emp. Opportunity Comm’n v. Glob. Horizons, Inc.*, 915 F.3d 631,
18 637 (9th Cir. 2019). Two or more “entities may simultaneously share control over the terms and
19 conditions of employment, such that both should be liable for discrimination relating to those
20 terms and conditions.” *Id.* Here, the jury found in a special verdict that Tesla was a joint
21 employer of Diaz. *See* Dkt. No. 291 at 1.

22 There was a legally sufficient evidentiary basis for the jury to find that Tesla employed
23 Diaz—even if it was not the employer listed on his paycheck—and that Tesla and Diaz had an
24 employment contract. No one disputes that (1) Tesla and Diaz are both capable of contracting and
25 (2) that employment is a lawful object. The jury could have found both remaining elements—
26 mutual consent and consideration. It could have found mutual consent from the facts that Diaz
27 applied to work at Tesla, was hired by a contractor at Tesla’s direction, worked in Tesla’s facility,
28 abided by working conditions and terms Tesla set, all at a pay level Tesla controlled and funded

1 from its own pocket, for the benefit of Tesla’s business. *See* Dkt. No. 297 at 7:11–713:23 (Tesla
2 supervisor describing supervising people in Diaz’s position); Dkt. No. 295 at 391:23–24 (Diaz
3 testifying that “all my directions came from Tesla”); *id.* at 392:18–20 (Diaz testifying that Tesla
4 conducted safety training); *id.* at 399:23–400:16 (Diaz testifying that his supervisors were direct
5 Tesla employees). These all together are objective, outward manifestations that both parties
6 assented to the terms of their employment contract. *See Monster Energy Co. v. Schechter*, 7 Cal.
7 5th 781, 789 (2019) (“[T]he primary focus in determining the existence of mutual consent is upon
8 the acts of the parties involved.”); Restatement (Second) of Contracts § 19(1) (contracts may be
9 formed without written or spoken words, based on “acts”). As the Restatement puts it, “[w]ords
10 are not the only medium of expression. Conduct may often convey as clearly as words a promise
11 or an assent to a proposed promise.” Restatement (Second) of Contracts § 19 comm. a. And both
12 parties gave the classic consideration in an employment contract: Diaz gave his labor, Tesla gave
13 wages (through an intermediary). A jury could therefore find that Tesla and Diaz had formed an
14 employment contract because “the conduct of [Tesla] and [Diaz] looked like an employment
15 agreement, walked like an employment agreement, [and] sounded like an employment
16 agreement.” *Baker v. Elmwood Distrib., Inc.*, 940 F.2d 1013, 1018 (7th Cir. 1991).

17 Tesla’s brief is conspicuously silent on the precise elements of the contract it thinks are
18 missing, so it is difficult to address its argument. To the extent its argument is that Diaz signed a
19 written contract with a staffing agency, not Tesla, that is immaterial because contracts need not be
20 written. As noted, there was a legally sufficient basis for the jury to find, as it did, that Tesla was
21 a joint employer. Tesla relies on *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208 (3d Cir. 2015),
22 which also dealt with a defendant that used a staffing company to hire the plaintiff. There, the
23 court found there could not be Section 1981 liability because (1) the plaintiff “d[id] not argue that
24 he me[t]” the contractual liability standard and (2) “the record does not indicate that Faush entered
25 into a contract with Tuesday Morning or ever attempted to do so.” *Id.* at 220. *Faush* is about that
26 particular plaintiff’s failure to show the existence of a contract. The Third Circuit did not hold or
27 imply that a defendant’s use of a staffing company automatically shields it from Section 1981
28 liability.

1 Finally, it is worth taking a step back to view the bigger picture. Diaz had an employment
2 contract with his staffing company. Tesla used that staffing company to get employees. There
3 was a legally sufficient evidentiary basis to support a finding that Tesla was in fact an employer of
4 Diaz. In that circumstance, it makes perfect sense that an employment contract would exist
5 between Diaz and Tesla too.

6 **B. Third-Party Beneficiary**

7 Second, the jury could have found that Diaz could sue under Section 1981 because he was
8 a third-party beneficiary of Tesla's contract with nextSource, the staffing company that hired
9 Diaz's staffing company.

10 I have already ruled in this case that intended beneficiaries can bring Section 1981 claims
11 based on the contract from which they benefit. Dkt. No. 278. Tesla's brief does not take issue
12 with that ruling and, indeed, affirmatively argues that Diaz does not meet the standard. Under
13 California law, a "third party may enforce a contract made for his or her benefit or made for the
14 benefit of a class of which he or she is a member." *Serv. Emps. Internat. Union, Loc. 99 v.*
15 *Options--A Child Care & Hum. Servs. Agency*, 200 Cal. App. 4th 869, 878 (2011). A contract
16 "need not expressly state that it is intended to benefit a third party as long as such an intent is
17 apparent through the ordinary means of contract interpretation." *Id.*

18 Tesla's contract with nextSource was intended to benefit Diaz and the class of people—the
19 employees—of which he was a part. Its primary intent, no doubt, was to benefit the parties by
20 setting up a system to hire workers. But the question is not about the parties' *primary* goal, it is
21 whether the contract intends a non-incidental, none-remote benefit to a third party.

22 Because Tesla cannot reasonably argue that the employment contract is not geared, in part,
23 toward benefitting the employee to be hired, it relies almost entirely on one paragraph of that
24 agreement. That paragraph states,

25 Third Party Beneficiaries. This Agreement is entered into solely between Tesla and
26 Supplier and, except for the Parties indemnification obligations under Section 11
27 (Indemnification) and the Service Recipients, will not be deemed to create any rights in
28 any third parties or to create any obligations of either Tesla or Supplier to any third parties.

Trial Ex. 3 ¶ 14.10.

1 Tesla cites *Balsam v. Tucows Inc.*, which found that a similar clause to mean that there
2 were no third-party beneficiaries. 627 F.3d 1158, 1163 (9th Cir. 2010). But here, the jury could
3 reasonably conclude from “the circumstances under which [the contract] was entered” that the
4 contract exists to benefit, at least to some extent, the class of which Diaz is part. *Prouty v. Gores*
5 *Tech. Gr.*, 121 Cal.App.4th 1225, 1233 (2004). Tesla cannot—at least as a matter of law—escape
6 its legal obligations by inserting a factual boilerplate like the provision that claims not to create
7 rights in third-parties. *Cf. Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 339 (2000) (holding that at-
8 will employment provision could be considered but could be overcome by other evidence of
9 intent). In other words, if the contract as a whole indicates the sky is blue, a single clause
10 indicating it is red does not prevail. As *Balsam* said, the clause there governed in “the absence of
11 any evidence to the contrary.” *Balsam*, 627 F.3d at 1163. Indeed, *Balsam* contemplated situations
12 where “third party beneficiary rights [] would control over the explicit ‘No Third-Party
13 Beneficiaries’ clause” based on the parties’ intent. *Id.* at 1162 (emphasis added). And *Balsam*
14 involved a suit by someone who received spam email and claimed that he was a third-party
15 beneficiary of a contract between the registrar of a domain name and ICANN (which partially
16 regulates domain names). Here, in marked contrast, Diaz was an employee alleging he is a third-
17 party beneficiary of the very contract that makes his employment possible. That is a far tighter
18 connection than the tenuous one in *Balsam* and a jury could find that this reality trumps a lone
19 contractual phrase to the contrary.¹

20 **II. MOTION TO STRIKE**

21 Diaz called financial expert Charles Mahla to testify about Tesla’s value. Tesla did not
22 object to his testimony. After both sides rested, Tesla moved to exclude his testimony. *See*
23 Motion to Strike (“Strike Mot”) [Dkt. No. 281]. As I explained from the bench, the motion is
24 denied for two reasons.

25 Fundamentally, Tesla waived its objection by failing to make it when Mahla testified (or in

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¹ Tesla also relies on *Pegasus Satellite Television, Inc. v. DirecTV, Inc.*, 318 F. Supp. 2d 968 (C.D.
28 Cal. 2004), but even if that case applied the correct legal standard in its time, it did not apply the
modern legal standard, which does not require an express creation of rights.

1 a *Daubert* motion before trial). *See Puckett v. United States*, 556 U.S. 129, 134 (2009); *Skydive*
2 *Arizona, Inc. v. Quattrocchi*, 673 F.3d 1105, 1113 (9th Cir. 2012); *Marbled Murrelet v. Babbitt*,
3 83 F.3d 1060, 1067 (9th Cir. 1996), *as amended on denial of reh'g* (June 26, 1996). Tesla has
4 been on notice of the content of Mahla's testimony for years due to expert disclosures and his
5 deposition. It stated it had no objection to qualifying him as an expert and its counsel remained
6 silent through the entirety of his testimony. It only raised the objection after both parties rested.

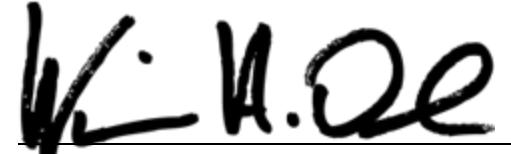
7 And even if the objection were not waived, it is meritless. Tesla's argument is that
8 Mahla's valuation of the company is not based on technical or specialized knowledge, is lay
9 witness testimony, and is not helpful to the jury as a result. All that Mahla did, Tesla argues, was
10 multiply the number of outstanding Tesla shares with the value of each share and announce the
11 result to the jury. It is incorrect in several ways. An expert's valuation of a company is
12 admissible as expert testimony if methodologically sound. *See, e.g., Pooshs v. Phillip Morris*
13 *USA, Inc.*, 287 F.R.D. 543, 549–50 (N.D. Cal. 2012). The primary utility of Mahla's testimony
14 was providing the jury with a *measure* of the value of a company, something that would be within
15 the knowledge of a financial expert, not a layperson. *See* Dkt. No. 296 at 682:2–12. He opined
16 that market capitalization is such a measure. *Id.* He then went on to calculate Tesla's market cap.
17 *Id.* It is true that *that* calculation was simply multiplying shares by value, but the jury would not
18 have had that financial information unless he revealed it to them, so his testimony assisted them in
19 understanding matters outside the ken of laypeople.

20 CONCLUSION

21 As previously ordered, the motions for judgment as a matter of law and to strike are
22 DENIED.

23 **IT IS SO ORDERED.**

24 Dated: October 6, 2021



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27 William H. Orrick
28 United States District Judge